

In The

Supreme Court of The United States

October Term, 1988

Supreme Court, U.S.

FILED

SEP 2 1988

JOSEPH F. SPANIOLO, JR.

JANE ANDRE,

*Petitioner,*

v.

THE BENDIX CORPORATION,

*Respondent.*

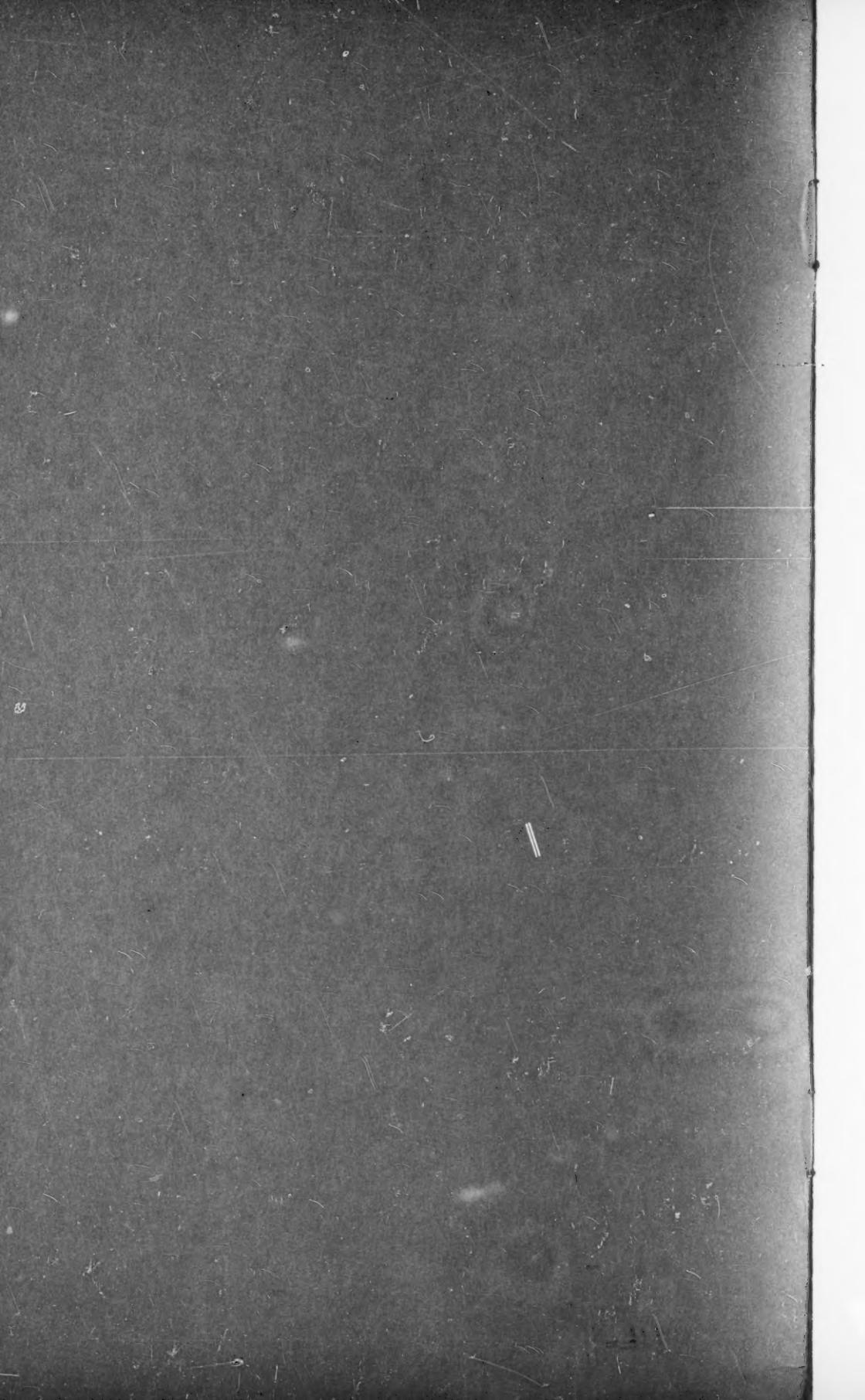
ON PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN  
OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI

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## **STATEMENT REQUIRED BY RULE 28.1**

On April 1, 1985, The Bendix Corporation was merged into Allied Corporation which is a wholly-owned subsidiary of Allied-Signal Inc.

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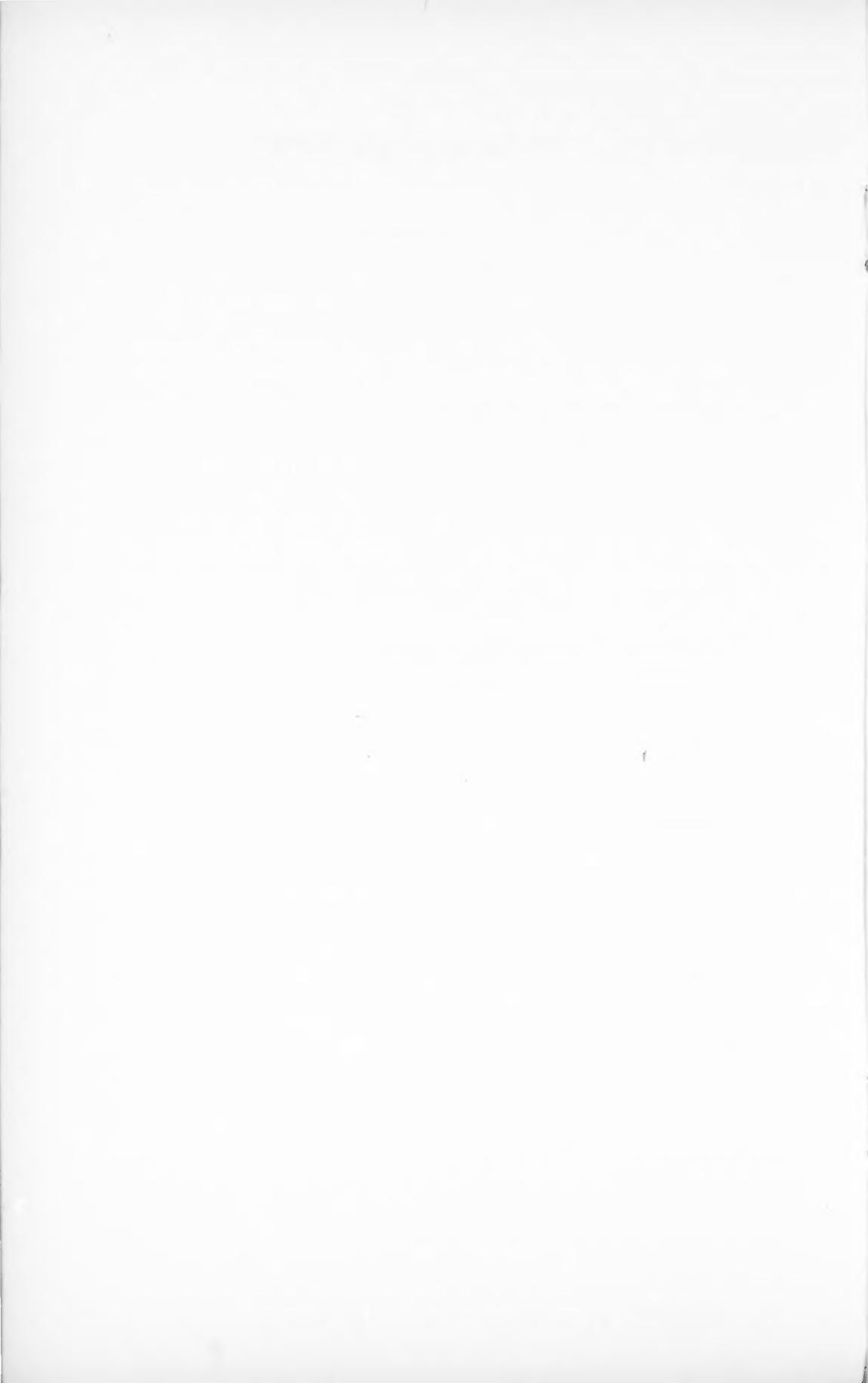
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STATEMENT OF THE CASE

Petitioner Jane Andre ("Andre") recites a lengthy statement of facts which presents the evidence in the light most favorable to her. The operative facts found by the District Court pursuant to Fed. R. Civ. P. 52 are set forth in the District Court's November 12, 1987 Memorandum and Order (Appendix B To Petition). Those findings of fact, not Andre's statement, are controlling for purposes of appellate review and there is no need to repeat them here.

There are, however, several facts raised by Andre which warrant brief responses. First, Andre makes much of the fact that she was escorted out of the plant while a male employee discharged for slashing tires was not escorted (Petition at pp. 19 n. 2, 22). However, Plaintiff fails to present all of the record evidence on this subject. Franz asked the security guard to accompany him to the meeting with Andre to serve as a witness because of Andre's confrontational conduct displayed earlier in the day (Tr. 117, 165, 510). When Franz previously discharged a male for slashing a tire, he likewise had a witness present (Tr. 118). Franz selected the security guard as a witness because he happened to be walking by the guard station on his way to meet with Andre (Tr. 117, 165, 510). After questioning Franz whether other officials had been notified of his decision, and after initially refusing to return her identification badge, Andre left, adding that she would see Franz in court (Tr. 166, 334-35).

The Court of Appeals expressly considered this evidence relating to the escort (Appendix C to Petition at p. 5c n. 5). However, it concluded, for the same reasons expressed in *Andre v. The Bendix Corp.*, 774 F.2d 786 (7th Cir. 1985) (hereinafter referred to as "Andre I"), that such evidence did not support an inference of sex discrimination.

Second, Andre asserts that objective measurements of her performance establish that her "work performance was positive" (Petition at pp. 10-11). However, it was Andre's deficiencies in interacting with her superiors, peers and subordinates, and not necessarily her technical performance, that resulted in her discharge (Def. Exs. L-M). Moreover, the record evidence also establishes that other objective measurements of her performance reflected unsatisfactory performance (Pl. Ex. 28 at pp. 12B, 43; Tr. 500-03, 533-35, 614-15; Def. Exs. Z, AA, AB, AC, AD).

Third, Andre asserts that "the District Court believed the testimony of [Andre] instead of the testimony of Respondent's

other witnesses" (Petition at p. 18 n. 1). It is true that the District Court credited some of Andre's testimony over some of Respondent's witnesses. However, the District Court also discredited some of Andre's testimony (Appendix B at p. 27b n. 16), and found some of her testimony to be "substantial exaggeration" (Appendix B at p. 54b).

## ARGUMENT

### I. Reliance On *Andre I* By The Court Of Appeals Was Appropriate.

The crux of Andre's Petition is that the Court of Appeals erred by relying upon facts and evidence from *Andre I*. This argument inaccurately describes the decision of the Court of Appeals.

In *Andre I*, the Court of Appeals stated that "[i]f we were sitting as triers of fact, we would certainly have difficulty finding that Andre had been discriminated against on account of her sex" (Appendix A at p. 2a). Except for certain pieces of new evidence presented by both parties, the record evidence in the second trial was virtually identical to the record evidence in the first trial. Consequently, in *Andre v. The Bendix Corp.*, 841 F.2d 172 (7th Cir. 1988) (hereinafter referred to as "*Andre II*"), the Court of Appeals referred to its reasoning in *Andre I* in concluding that the District Court's finding of no sex discrimination was not clearly erroneous. The Court of Appeals did not rely on evidence from *Andre I* that was not present in *Andre II*, nor did it ignore the new evidence presented at the second trial. Rather, the Court of Appeals logically and reasonably relied on its reasoning and conclusions from *Andre I* where the evidence was identical or nearly identical. There is no legal authority which even remotely suggests that such reliance is in conflict with the law of other circuits or constitutes reversible error of such importance that this Court should grant review.

## II. The Court Of Appeals Applied The Proper Standard Of Review.

The District Court, pursuant to its obligations under Fed. R. Civ. P. 52, issued an extensive set of findings of fact and conclusions of law. The Court of Appeals properly applied the clearly erroneous standard set forth in Rule 52 as construed in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The Court of Appeals' decision is fully consistent with the decisions by this Court, the Seventh Circuit and other courts of appeals.

Andre alleges that the decision of the Court of Appeals is inconsistent with two Supreme Court decisions rendered over a century ago. *Insurance Co. v. Dunn*, 86 U.S. 214 (1874) and *United States v. Ayres*, 76 U.S. 608 (1870). Neither case, however, involves an appellate court's standard of review and they have no bearing on this case.

The dispositive facts with respect to the Petition are that the Court of Appeals fully reviewed the findings of fact and conclusions of law issued by the District Court, applied the correct standard of proof for employment discrimination suits set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), applied the correct appellate standard of review as set forth in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and affirmed the District Court's decision based in part on some of the reasons expressed by the Court of Appeals in *Andre I*. The decision of the Court of Appeals is fully consistent with applicable law and presents no issue which warrants review by this Court.

**CONCLUSION**

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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